No. 08-983

In the Supreme Court of the United States

JOSE ANGEL SERNA-GUERRA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Texas offense of unauthorized use of a motor vehicle qualifies as a "crime of violence" under 18 U.S.C. 16 and is therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is reprinted in 285 Fed. Appx. 110. The orders of the Board of Immigration Appeals (Pet. App. 11a-12a, 13a-15a) are unreported. The decision of the immigration judge (Pet. App. 16a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. A petition for rehearing was denied on November 3, 2008 (Pet. App. 23-30a). The petition for a writ of certiorari was filed on February 2, 2009 (a Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be removed from the United States if he has been convicted of an "aggravated felony" at any time after his admission. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to encompass numerous categories of offenses, including "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). Section 16, in turn, defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 16. The term "aggravated felony" also includes "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G).

2. Petitioner is a citizen of Mexico who was admitted to the United States in 1983 as a lawful permanent resident. In 1986, petitioner pleaded guilty in a Texas court to the felony offense of unauthorized use of a vehicle (UUV) in violation of Texas Penal Code § Ann. 31.07(a) (Vernon 2003), which provides that "[a] person commits an offense if he intentionally or knowingly operates another's * * * motor-propelled vehicle without the effective consent of the owner." Petitioner was sentenced to five years of imprisonment, but that sentence was

suspended, and he was placed on five years of probation. Pet. App. 14a, 18a.

3. In 2005, United States Immigration and Customs Enforcement (ICE) brought removal proceedings against petitioner based on the Texas conviction. ICE charged petitioner with being removable under Section 1227(a)(2)(A)(iii) because, after his admission, he had been convicted of an aggravated felony. ICE alleged that petitioner's crime of conviction is both a crime of violence, under Section 1101(a)(43)(F), and a theft offense, under Section 1101(a)(43)(G). Pet. App. 16a-17a.

An immigration judge in San Antonio, Texas, ordered that petitioner be removed. Pet. App. 16a-22a. The immigration judge found that petitioner's conviction for UUV is an aggravated felony because it is both a crime of violence and a theft offense. *Id.* at 18a-21a.

Petitioner appealed to the Board of Immigration Appeals (Board), which dismissed the appeal. Pet. App. 13a-15a. The Board affirmed the immigration judge's determination that petitioner is removable under Section 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony because the Texas UUV offense is a crime of violence. *Id.* at 15a. The Board did not address whether UUV is also a theft offense. See *id.* at 13a-15a.

Petitioner sought review of the Board's removal order in the United States Court of Appeals for the Fifth Circuit. The Attorney General filed a motion to remand the case to the Board for reconsideration in light of this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which held that driving under the influence (DUI) is not a crime of violence under 18 U.S.C. 16 because DUI involves negligent conduct that does not constitute the sort of violent, active crime to which Section 16 is directed. Petitioner did not oppose the motion to remand.

Administrative Record (A.R.) 52-56. The court of appeals remanded the case to the Board. *Id.* at 51.

On remand, the Board reaffirmed its prior ruling. Pet. App. 11a-12a. Relying on Fifth Circuit precedent, the Board concluded that the Texas offense of UUV is a crime of violence under 18 U.S.C. 16 and that petitioner therefore is removable as an aggravated felon. Pet. App. 12a.

4. The court of appeals summarily affirmed the Board's ruling. Pet. App. 1a-10a. The court held that it was bound by Fifth Circuit precedent to conclude that UUV is a crime of violence under Section 16 and therefore an aggravated felony under Section 1101(a)(43)(F). *Id.* at 1a-2a. Judge Jolly concurred in only that part of the court's opinion. *Id.* at 1a n.*. In the remainder of the opinion, Judges Dennis and Prado urged the full court to rehear the case en banc and to overrule the controlling precedent. *Id.* at 2a-10a.

Petitioner sought rehearing en banc, but the court of appeals denied his petition. Pet. App. 23a. Judge Dennis, joined by Judges King, Wiener, and Prado, dissented from the denial of rehearing en banc. *Id.* at 24a-30a. The dissenting judges argued that the Fifth Circuit's precedent holding that the Texas UUV offense is a "crime of violence" under Section 16 is incorrect and conflicts with *Leocal* v. *Ashcroft*, *supra*, and *United States* v. *Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007). See Pet. App. 24a-30a.

DISCUSSION

Petitioner argues (Pet. 7-15) that this Court should grant plenary review because the Texas UUV offense of which he was convicted is not a "crime of violence" under 18 U.S.C. 16, and because the court of appeals' deci-

sion upholding his removal conflicts with decisions of this Court and the United States Court of Appeals for the Tenth Circuit. In the alternative, petitioner argues (Pet. 7-8, 13, 27, 28) that this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further consideration in light of *Chambers* v. *United States*, 129 S. Ct. 687 (2009). The Court in *Chambers* held that a failure to report for weekend confinement is not a violent felony under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), because it does not present a serious potential risk of physical injury to another. Respondent agrees that the Court should grant, vacate, and remand in light of *Chambers*.

As petitioner notes (Pet. 7-8), following the decision in *Chambers*, this Court granted certiorari, vacated the judgments below, and remanded for further consideration in three cases from the Fifth Circuit raising the same issue that petitioner raises here. See *Castillo-Lucio* v. *United States*, 129 S. Ct. 993 (2009); *Armendariz-Moreno* v. *United States*, 129 S. Ct. 993 (2009); *Reyes-Figueroa* v. *United States*, 129 S. Ct. 998 (2009). The United States subsequently filed letter briefs in two of those three cases, informing the Fifth Circuit that, in light of *Chambers* and *Begay* v. *United States*, 128 S. Ct. 1581 (2008), which held that DUI is not a violent felony under the ACCA, the government no longer adheres to its prior position that UUV is a crime of violence under Section 16. See Letter from Tim Johnson, Acting U.S. Att'y, to Hon. Charles R. Fulbruge III, Clerk, U.S. Court of Appeals for the Fifth Circuit, regarding *United States* v. *Armendariz-Moreno*, No. 07-40225 (Mar. 30, 2009); Letter from Tim Johnson, Acting U.S. Atty, to Hon. Charles R. Fulbruge III, Clerk, U.S. Court of Ap-

peals for the Fifth Circuit, regarding *United States* v. *Castillo-Lucio*, No. 07-40752 (March 30, 2009).

In light of the remands and the government's change of position, the Fifth Circuit may well reconsider its prior rulings on the issue and bring itself into alignment with the Tenth Circuit. Plenary review of the issue by this Court would therefore be premature at this time. Instead, the Court should follow the same approach here that the Court took in *Castillo-Lucio*, *Armendariz-Moreno*, and *Reyes-Figueroa*.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Chambers* v. *United States*, 129 S. Ct. 687 (2009).

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

MAY 2009